U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 March 2007

CASE NO.: 2006-BLA-5395

In the Matter of:

J. V.
Claimant

v.

JONES TRUCKING, INC.
Employer

and

WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

David E. Furrer, Esq.,
For the Claimant

Francesca Tan, Esq.,
For the Employer/Carrier

BEFORE: DANIEL L. LELAND
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*, as amended ("Act"). The act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to living coal miners who are totally disabled due to pneumoconiosis and their dependents.

PROCEDURAL HISTORY

The miner filed his first prior claim for benefits on July 8, 1996. (Director's Exhibit ("DX") 1). The claim was denied because the evidence failed to establish that the miner had coal worker's pneumoconiosis or was totally disabled due to coal workers' pneumoconiosis. No further action was taken by the miner after the decision denying benefits.

The miner filed his current claim for benefits on August 23, 2004. (DX 3). On June 7, 2005, the claim was denied by the district director because the evidence failed to establish any of the elements of entitlement. (DX 22). Thereafter, on June 29, 2005, the miner requested a formal hearing before the Office of Administrative Law Judges. (DX 23).

On October 18, 2006, I held a hearing in Morgantown, West Virginia, at which the claimant and employer were represented by counsel.[1] No appearance was entered for the Director, Office of Workers' Compensation Programs (OWCP). The parties were afforded the full opportunity to present evidence and argument. Director's exhibits ("DX") 1-28[2] and Employer's exhibits ("EX") 1-7 were admitted into the record. Claimant did not present any exhibits to the undersigned. Additionally, Employer's counsel submitted a closing argument post-hearing for my consideration.

ISSUES

I. Whether the miner has pneumoconiosis?

II. Whether the miner's pneumoconiosis arose out of his coal mine employment?

III. Whether the miner is totally disabled?

IV. Whether the miner's disability is due to pneumoconiosis?

V. Whether there has been a change in an element of entitlement since the prior denial of benefits?

[1] Under *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1998)(en banc), the location of a miner's last coal mine employment, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction. Under *Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989), the area the miner was exposed to coal dust, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction.

[2] The transcript states that there are 20 Director's exhibits. The file actually contains 28 Director's exhibits. At the hearing, the parties stated that they had no objections to the exhibits, including reference by Employer's counsel to 28 exhibits. As such, Director's exhibits 1 through 28 are hereby admitted into the record.

FINDINGS OF FACT

I. Background

The claimant was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations, for at least 19 years, as stipulated to by the parties. (Hearing Transcript (TR) 6).

Jones Trucking, Inc. is the last employer for whom the claimant worked a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case, under Subpart G, Part 725 of the Regulations.

The claimant has one dependent for purposes of augmentation of benefits under the Act, his wife. They married on December 15, 1967. The claimant was born on May 12, 1950. (DX).

II. Medical Evidence

The following is a summary of the evidence submitted [since the final denial of the prior claim.

A. Chest X-rays[3]

The following chart is a summary of the chest X-ray evidence submitted in the claim.

Exh. #	Dates: 1. X-ray 2. Read	Reading Physician	Qualifications*	Film Quality	Interpretation Or Impression
DX 15	9/17/2004	Dr. Benjamin	B, BCR	1	No abnormalities consistent with CWP.
DX 16	9/17/2004	Dr. Binns	B, BCR	2	Quality only reading.
EX 3	9/17/2004	Dr. Wheeler	B, BCR	2	No abnormalities consistent with CWP.
EX 1	8/2/2005	Dr. Renn	B, BCI(P)	1	No abnormalities consistent with CWP.

* A-A-reader; B-B-reader; BCR – Board Certified Radiologist; BCP – Board-Certified Pulmonologist; BCI – Board-Certified Internal Medicine; BCI(P) – Board-Certified Internal Medicine with Pulmonary Medicine sub-specialty.

[3] In the absence of evidence to the contrary, compliance with the requirements of Appendix A shall be presumed. 20 C.F.R. § 718.102(e) (effective Jan. 19, 2001).

B. Pulmonary Function Studies[4]

Physician Date Exh. #	Age Height	FEV1	MVV	FVC	Qualify*
Dr. Sagin 9/17/2004 DX 14	54 69”	2.70		4.19	No
Dr. Bess 1/30/2004 DX 21	53 69.5”	2.28		3.97	No
Dr. Bess 7/22/2000 DX 21	50 69.5”	2.13		3.63	No
Dr. Renn 8/2/2005 EX 1	55 70”	2.77 2.96+	51 68+	4.11 4.51+	No No

***** A “**qualifying**” pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718.

+ Results after the use of bronchodilators.

For a miner of the claimant’s height of 69.5 inches, § 718.204(b)(2)(i) requires an FEV1 equal to or less than 2.11 for a male 70 years of age.[5] If such an FEV1 is shown, there must be in addition, an FVC equal to or less than 2.67 or an MVV equal to or less than 84; or a ratio equal to or less than 55% when the results of the FEV1 tests are divided by the results of the FVC test.

[4] § 718.103(a)(Effective for tests conducted after Jan. 19, 2001 (See 718.101(b)), provides: “Any report of pulmonary function tests submitted in connection with a claim for benefits shall record the results of flow versus volume (flow-volume loop).” 65 Fed. Reg. 80047 (Dec. 20, 2000).

[5] The fact-finder must resolve conflicting heights of the miner on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This is particularly true when the discrepancies may affect whether or not the tests are “qualifying.” *Toler v. Eastern Associated Coal Co.*, 42 F.3d 3 (4th Cir. 1995). I find the miner is 69.5” here, his average reported height.

C. Arterial Blood Gas Studies[6]

Date Exh. #	Physician	PCO2	PO2	Qualify
9/17/2004 DX 13	Dr. Sagin	38.9	82.5	No
8/2/2005 EX 1	Dr. Renn	38	86	No

D. Medical Reports[7]

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(a)(4). Where total disability cannot be established, under 20 C.F.R. § 718.204(b)(2)(i) through (iii), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b).

On September 17, 2004, Dr. Mark Sagin examined the miner. He noted nineteen years of coal mine employment. Dr. Sagin also listed that Claimant began smoking one pack of cigarettes per day at age nineteen and that Claimant now smokes eight to ten cigarettes per day. He listed the miner's complaints as daily sputum, daily wheezing, dyspnea when walking on an incline, cough, and paroxysmal nocturnal dyspnea. (DX 12).

After performing a chest X-ray, pulmonary function study, arterial blood gas study and a physical examination of the miner, Dr. Sagin diagnosed chronic bronchitis with airways obstruction. Dr. Sagin stated that cigarette smoking is the cause of the chronic bronchitis. Dr. Sagin also found that the miner is mildly impaired. (DX 12).

Dr. Renn, Board-certified in internal medicine and pulmonary diseases, examined the miner on August 2, 2005. (EX 1; EX 2). Dr. Renn noted the miner's symptoms of shortness of breath, exertional dyspnea, daily cough with sputum production, wheezing while asleep, two pillow orthopnea and occasional dependent edema. He has had hypertension since 1999. Claimant communicated to Dr. Renn that he smoked one pack of cigarettes per day from 1967 through 1995. Then, from 1995 until he quit in 2005, claimant smoked one half a pack of cigarettes per day. A serum nicotine test during the examination revealed no nicotine. (EX 1).

[6] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies.

20 C.F.R. § 204(b)(2) permits the use of such studies to establish "total disability." It provides:

In the absence of contrary probative evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii) or (iv) of this section shall establish a miner's total disability:…

(2)(ii) Arterial blood gas tests show the values listed in Appendix C to this part…

[7] *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 147 (2004) (en banc). Under (new) 2001 regulations, expert opinions must be based on admissible evidence.

Dr. Renn interpreted a chest X-ray as revealing atherosclerosis of the aorta and otherwise normal. He found no parenchymal or pleural abnormalities consistent with pneumoconiosis. Dr. Renn stated that Claimant did not provide complete cooperative effort during the spirometry. As such, Dr. Renn stated "[T]he MVVs do not correlate with the contemporaneously performed FEV1 thereby rendering them invalid." (EX 1).

Based on his examination, Dr. Renn diagnosed chronic bronchitis due to tobacco smoking. Dr. Renn found that coal dust exposure did not contribute to the miner's chronic bronchitis. Dr. Renn also found no "credible objective medial evidence" of any ventilatory impairment. (EX 1).

Dr. Fino, a B-reader and Board-certfied in internal medicine and pulmonary diseases, reviewed the miner's medical records. (EX 5; EX 6). He prepared a report explaining his conclusions, dated September 12, 2006. After reviewing the information, Dr. Fino concluded "[T]here is a mild airway obstruction present without evidence of emphysema or fibrosis, and it is non-disabling." Dr. Fino found the obstruction related to Claimant's cigarette smoking history. Dr. Fino also concluded that Claimant is not totally disabled. (EX 5).

Dr. Fino was deposed on October 12, 2006. (EX 7). Dr. Fino testified that Claimant has a significant history of exposure to coal dust. He further stated, however, that despite the exposure, Claimant did not develop a coal dust related lung disease. (EX 7, p. 10).

Dr. Fino stated that all the chest X-ray interpretations he reviewed had a reading of 0/0. Dr. Fino opined that Claimant did not provide good effort in the pulmonary function studies performed by Dr. Bess. As such, Dr. Fino stated that the values underestimate his true lung function. He found that better effort was given during Dr. Sagin's September 17, 2004 pulmonary function test and Dr. Renn's August 2, 2005 test. Dr. Fino determined that these tests revealed a mild obstruction. Dr. Fino also found that the arterial blood gas studies revealed normal results. (EX 7, p. 13-16).

Dr. Fino testified that he agrees with Drs. Sagin and Renn in their diagnosis of chronic bronchitis due to cigarette smoking. Dr. Fino explained that the lung volumes were overinflated and the diffusing capacity was normal. This led him to find that the miner has a smoking related condition, as opposed to a coal dust related condition. (EX 7, p. 19).

E. Claimant's Testimony

Claimant testified that his last employment was with Jones Trucking in September . Claimant began working with Jones Trucking in 1983. He explained that he was a truck driver hauling power plant coal and coal from regular coal mines. During the course of his work, Claimant never used any respirators or protective equipment. He left his job in 2003 due to his health. The miner testified that he could not breathe while working. (TR 9-14).

Claimant also testified that he started smoking cigarettes at age twenty. He smoked about one pack of cigarettes per day. He quit smoking in June of 2004 with the help of a doctor. (TR 15 – 17).

The miner stated that he began using inhalers to assist his breathing in 1994. At the time of the hearing, he was using three separate inhalers in a day. Claimant was diagnosed with diabetes in 1991. (TR 17 – 21).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish, by a preponderance of the evidence, that: (1) he has pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; and, (3) he is totally disabled due to pneumoconiosis. Failure to establish any one of these elements precludes entitlement to benefits. 20 C.F.R. §§ 718.202-718.205; *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989). *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997). The miner bears the burden of proving each element of the claim by a preponderance of the evidence, except insofar as a presumption may apply. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1320 (3rd Cir. 1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). Moreover, "[T]he presence of evidence favorable to the claimant or even a tie in the proof will not suffice to meet that burden." *Eastover Mining Co. v. Director, OWCP [Williams]*, 338 F.3d 501, No. 01-4604 (6th Cir. July 31, 2003).

Since this is the claimant's second claim for benefits, and it was filed on or after January 19, 2001, it must be adjudicated under the new regulations.[8] Although the new regulations

[8] Section 725.309(d)(For duplicate claims filed on or after Jan. 19, 2001)(65 Fed. Reg. 80057 & 80067):

(d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subpart E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see Section 725.202(d)(miner), 725.212(spouse), 725.218(child), and 725.222(parent, brother or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

(1) any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that he individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse, child, parent, brother, or

dispense with the "material change in conditions" language of the older regulations, the criteria remain similar to the "one-element" standard set forth by the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), which was adopted by the United States Court of Appeals for the Fourth Circuit, in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc) rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.* 117 S.Ct. 763 (1997). In *Dempsey, supra, the* Board held that where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement…has changed since the date upon which the order denying the prior claim became final." 20 C.F.R § 725.309(d); *White v. New White Coal Co.*, *Inc.*, 23 B.L.R. 1-1, 1-3 (2004). According to the Board, the "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. § 725.309(d)(2).

To assess whether a material change in conditions is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him in the prior denial. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995). *See Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. The administrative law judge must then consider whether all of the record evidence, including that submitted with the previous claim, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) and *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995).

The miner's first application for benefits was denied because the evidence failed to show that: (1) the claimant had pneumoconiosis; (2) the pneumoconiosis arose, at least in part, out of coal mine employment; and (3) the claimant was totally disabled by pneumoconiosis. (DX 1). Under the *Sharondale* standard, the claimant must show the existence of one of these elements by way of newly submitted medical evidence in order to show that a material change in condition has occurred. As discussed below, I find that claimant has not proven any of these elements by newly submitted evidence. As such, the evidence submitted in the miner's first claim for benefits are not considered in conjunction with the newly submitted evidence.

B. Existence of Pneumoconiosis

Pneumoconiosis is defined as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b) and 20 C.F.R. § 718.201. The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as

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sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see §725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

(5) In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R § 718.201.

The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Thus, "pneumoconiosis", as defined by the Act, has a much broader legal meaning than does the medical definition.

The miner has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by: (1) a chest X-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a)(1); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebutable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a)(4). In *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), the Fourth Circuit held that the administrative law judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffers from coal workers' pneumoconiosis.

The miner cannot establish pneumoconiosis pursuant to subsection 718.202(a)(2) because there is no biopsy evidence in the record. He cannot establish pneumoconiosis under § 718.202(a)(3), as none of the presumptions in that section are applicable to a living miner's claim filed after January 1, 1982, with no evidence of complicated pneumoconiosis.

A finding of the existence of pneumoconiosis may be made with positive chest X-ray evidence. 20 C.F.R. § 718.202(a)(1). As summarized above, the record contains three physician interpretations of two chest X-rays. All three interpretations are negative for coal workers' pneumoconiosis. As such, Claimant did not prove the existence of pneumoconiosis by chest X-ray evidence.

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative X-ray, 20 C.F.R. § 718.202(a). In addition to the negative chest X-ray evidence, Drs. Sagin, Renn and Fino agree that Claimant does not have coal workers' pneumoconiosis or a coal dust related lung condition.

Therefore, after reviewing the chest X-ray evidence and physician opinions together, I find theminer has not met his burden of proof in establishing the existence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) *aff'g sub. Nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 B.L.R. 2-64 (3rd Cir. 1993).

C. Cause of Pneumoconiosis

Once the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering from

pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b). If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of coal mine employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c).

Since the miner had ten years or more of coal mine employment, the claimant would ordinarily receive the benefit of the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. However, in view of my finding that the existence of CWP has not been proven the issue is moot. Moreover, the presumption is rebutted by the medical opinion evidence discussed herein.

D. Existence of total respiratory or pulmonary disability

The miner must show that his total pulmonary disability is caused by pneumoconiosis. 20 C.F.R. § 718.204(b). Section 718.204(b)(2)(i) through (b)(2)(iv) and (d) set forth criteria to establish total disability: (i) pulmonary function studies with qualifying values; (ii) blood gas studies with qualifying values; (iii) evidence that miner has pneumoconiosis and suffers from cor pulmonale with right-side congestive heart failure; (iv) reasoned medical opinions concluding the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment and gainful employment requiring comparable abilities and skills.

Section 718.204(b)(2)(i) provides that a pulmonary function test may establish total disability if its values are equal to or less than those listed in Appendix B of Part 718. Pulmonary function studies dated July 22, 2000, January 30, 2004, September 17, 2004 and August 2, 2005 all produced non-qualifying results. Claimant does not meet the standard for total disability based on these four pulmonary function studies.

A miner may also demonstrate total disability due to pneumoconiosis based on the results of arterial blood gas studies that evidence an impairment in the transfer of oxygen and carbon dioxide between the lung alveoli and the blood stream. § 718.204(b)(2)(ii). In addition to the pulmonary function studies, arterial blood gas studies performed on September 17, 2004 and August 2, 2005 produced non-qualifying results. Thus, the miner does not prove total disability by arterial blood gas studies.

Finally, total disability may be demonstrated, under § 718.204(b)(2)(iv), if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition presents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable or gainful work. § 718.204(b). Under this subsection, "…all the evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing, by a preponderance of the evidence, the existence of this element." *Mazgaj v. Valley Coal Company*, 9 B.L.R. 1-201 (1986) at 1-204. Drs. Sagin, Renn and Fino provided reasoned opinions regarding Claimant's ventilatory impairment. Dr. Sagin found a mild impairment due to chronic bronchitis caused by cigarette smoking. Dr. Renn found no credible evidence of impairment, and Dr. Fino found a mild obstructive impairment caused by cigarette

smoking. The physicians agree that the miner does not have a totally disabling respiratory impairment.

The overwhelming majority of the evidence does not prove the existence of a total respiratory disability. As such, I find the miner has not met his burden of proof in establishing the existence of total disability. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994), *aff'g sub. nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 B.L.R. 2-64 (3rd Cir. 1993).

E. Cause of total disability

The revised regulations, 20 C.F.R. § 718.204(c)(1), requires a claimant to establish his pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary disability. The January 19, 2001 changes to 20 C.F.R. § 718.204(c)(1)(i) and (ii), adding the words "material" and "materially", results in "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. No. 245, 7999946 (Dec. 20, 2000).

As stated above, I find that the miner has proven neither the existence of coal workers' pneumoconiosis nor the existence of a total respiratory disability. Therefore, the issue of disability causation is moot. Furthermore, the evidence shows that Claimant's pulmonary impairment, if any, is due to a cigarette smoking induced lung disease.

ATTORNEY FEES

The award of attorney's fees, under the Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

CONCLUSIONS

In conclusion, the claimant has not established that a material change in conditions has taken place since the previous denial. The claimant does not have pneumoconiosis, as defined by the Act and Regulations. The claimant is not totally disabled. He is therefore not entitled to benefits.

ORDER[9]

IT IS ORDERED THAT the claim of J. V. for benefits under the Black Lung Benefits Act is hereby DENIED.

A

DANIEL L. LELAND
Administrative Law Judge

NOTICE OF APPEAL RIGHTS (Effective Jan. 19, 2001): Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board before the decision becomes final, i.e., at the expiration of thirty (30) days after "filing" (or **receipt by**) with the Division of Coal Mine Workers' Compensation, OWCP, ESA, ("DCMWC"), by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601.** At the time you file an appeal with the Board, you **must also send a copy** of the appeal letter to **Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210**. *See* 20 C.F.R. § 725.481.

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).

[9] Section 725.478 Filing and service of decision and order (Change effective Jan. 19, 2001). Upon receipt of a decision and order by the DCMWC, the decision and order shall be considered to be filed in the office of the district director, and shall become effective on that date.